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CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, et al.,
Petitioners,

v.

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

BRIEF ON BEHALF OF RESPONDENT REDERI A/S HENNESEID

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Respondents.

BRIEF FOR RESPONDENT REDERI A/S HENNESEID

Statement

The respondent opposes the application for a writ of certiorari herein. The only ground asserted in the petition is that the Circuit Court of Appeals for the Second Circuit has misapplied the so-called "rule of the *Pennsylvania*", 19 Wall. 125, and has rendered a decision in conflict with decisions in other circuits.

The respondent contends:

(1) that both the District Court and the Circuit Court of Appeals made findings of fact to the effect that the burden of proof imposed by the rule of the *Pennsylvania* had been sustained, and that this Court will not review such concurrent findings of fact. That is the short and simple answer to the application (pp. 6-9, *infra*);

(2) that while, as just stated, the decision of the Circuit Court of Appeals was based on the facts, it did not in its discussion misinterpret the *Pennsylvania*, nor is its decision in any respect in conflict with those of this Court or of other Circuit Courts of Appeals (pp. 14-17, *infra*);

(3) that, since the present case is concededly governed by the law of Canada, where the presumption referred to in the *Pennsylvania* does not exist, that presumption should not be applied here (pp. 17-19, *infra*).

The District Court wrote an unusually careful and exhaustive opinion (R. pp. 1370-1405). The majority of the Circuit Court of Appeals affirmed (R. pp. 1443-1451). Judge Frank, in his opinion (R. pp. 1452-1462), did not advocate reversal, but merely the return of the case to the District Court for some additional findings of fact. The additional findings suggested by Judge Frank appear to be covered, either by the findings already made or by the uncontradicted evidence of witnesses whom the District Court found to be truthful (pp. 9,14, *infra*).

The Facts

The Navigation.

The Aakre sailed from St. John at about 9 P. M. on October 28, 1937. Shortly before midnight, some engine difficulty occurred and the engines were stopped for three hours while repairs were made. During this three hours, the ship was drifting in the tides of the Bay of Fundy and

thick fog came on. She started her engines again at 2:50 A. M., at which time she was in dense fog.

Shortly before 2 A. M., just as fog and rain were closing in, the third officer saw in the distance a light, and thought that he counted the particular frequency of flashes peculiar to Prim Point light, on the easterly side of the Bay. In fact, he was too far away to have seen the light itself though, as the District Court found, he may have seen its reflection on the clouds. He noted the bearing of the light which he saw and drew it on the chart. The master, as the Circuit Court of Appeals found (R. p. 1445), was surprised at the position thus indicated (Oyan, pp. 222-224, 290-291), and he therefore directed the second officer to obtain a radio bearing from the radio station at St. John. Such a station, on receiving a ship's signal, determines the precise direction from which the signal comes, and then radios to the ship her exact true bearing from the radio station. On this occasion, the bearing was correctly transmitted and received, but was incorrectly laid out on the chart by the second officer, and thus an incorrect fix of the ship's position was obtained, indicating that she was on the eastern side of the Bay. This apparently confirmed the theory that the light which had been sighted was actually that of Prim Point. Because of this error, a course was set angling towards the western side of the Bay. After the vessel had run on this course for some time, radio bearings were secured again, but the same mistake was repeated, with the result that her position was thought to be in dangerous proximity to Northwest Ledge on the eastern side of the channel, although in fact she was near the western side. The situation appeared to be imminently perilous, and therefore the vessel was steered away from the supposed danger of Northwest Ledge, with the result that she stranded within about twenty minutes on Cheney Island.

It is extremely important to observe that the compasses had nothing whatever to do with these incorrect fixes of the vessel's position. A compass tells only the direction

of magnetic north. It does not tell anything about the direction in which a vessel may drift or about her actual position. Nor is the compass used in any way in taking radio bearings or in laying them off on the chart. The erroneous fixing of the vessel's position was not, and could not have been, based on any reading of the compass, because compasses do not give information of that character. The incorrect fixes were the result solely of the errors in laying off the radio bearings, and the courses which led to the stranding were set in reliance on those incorrect fixes. The compasses played no part in the matter and the Courts below so found.

The argument of the petitioners and also the doubts expressed by Judge Frank are based upon a conjecture that the master might have distrusted his compasses; that, if so, that might have been a factor in the mistake as to his ship's position; and that, unless the master considered the tides unpredictable, he might have determined the position by estimating the drift during the three-hour period, from the tidal predictions in the tide tables and from the current data on the charts. The petitioners seek to inquire into the master's state of mind regarding his compasses and regarding the possibility of determining the effect of the tides by dead reckoning. But the findings and the testimony below establish that the master did *not* distrust his compasses and was not willing to guess at his ship's position by trying to estimate the erratic currents of the Bay of Fundy, when he could obtain an accurate result by radio bearings. Besides, as already observed, compasses give no information about drift.

The question raised are questions of fact and they were decided adversely to the petitioners in both courts below.

The Compass Book.

Since the petition frequently refers to the compass book, a brief statement should be made of the method by which this book was kept. The purpose of a compass record is to inform the navigator of the deviations. If a man gets

ten deviations on a particular heading, all showing the same thing, there is no point in writing them all down in the compass book. Indeed, from the point of view of quick reference, it is better not to do so (Tvede, p. 943). On the *Aakre*, when weather permitted, deviation observations were taken always once a day and usually more, and the results were entered in the compass book if they were such as to change or modify the information already there; also the deviation was observed, if conditions made it possible, on each change of course (Oyan, pp. 208-211, 286, 287, 657; Knudsen, p. 356).

The Norwegian Regulations, to which cargo has referred, are merely administrative rules, made by the executive under statutory authority, requiring the officers and engineers of ships, under penalty, to keep certain records. The regulations impose no duty on the shipowner, except perhaps to supply the books, which was concededly done. They are not "a command" "directly from the statute to the vessel and her owner" as in the *Denali*, 105 Fed. (2d) 413 at 416. The only command is to the officers and the only penalty is on them. These regulations, which are printed at pages 1124-1127, nowhere require that every observation taken must be entered, and it is obvious that, on days when atmospheric conditions are not clear or when the ship is rolling heavily, the results of particular observations may not be accurate, and to enter them would be misleading.

With respect to the particular quadrant which is important in this case, the southwest, three observations on courses in that quadrant had been made and entered in the compass book within less than a month before the accident. The District Court found (pp. 1385, 1386) that the deviation records for that quadrant were sufficient and that "the recording of all the identic observations of deviation would not add anything to the information of the person seeking to navigate the Aakre." The majority of the Circuit Court of Appeals made similar findings, quoted pp. 7, 8, *infra*.

I

The findings of fact in the District Court and in the Circuit Court of Appeals.

The Courts below made findings:

(1) that the errors in fixing the ship's position were errors of navigation caused by the incorrect laying down of the radio bearings;

District Court, p. 1389:

> "I find that the cause of the stranding of the 'Aakre' was entirely due to the error of navigation on the part of the second mate in erroneously laying out the bearing which he had received from St. John."

Page 1400:

> "Consequently, I find that the navigation of the 'Aakre' on the night of the stranding is thus satisfactorily established beyond any reasonable doubt, and that the theories thereof advanced on behalf of cargo are wholly unsustainable."

Majority opinion of Circuit Court of Appeals, p. 1445:

> "By this error the apparent position of the vessel was shown to be far east of its actual position, and the third officer's mistaken report of having sighted Prim Point Light was confirmed. Hence the captain believed that he was east, instead of west, of his original course, and set the new 2:50 A. M. course accordingly."

Page 1446:

> "It is entirely futile for appellants to question that such apparently simple mistakes of navigation could have been made. The three stated radio bearings were certainly taken, and the ship's course was certainly laid as described. No other explanation of that course,

except the complete uselessness of the compasses, can be imagined. Appellants do not suggest this, or any alternative explanation. The compasses were shown to be accurate and reliable, the court found that they were, and appellants have not even made out a serious case to the contrary."

(2) that the compasses and the compass records had nothing to do with these mistakes or with the resulting stranding;

District Court, p. 1401:

"Accordingly, due to my study of the facts as explained above in this opinion, I hold that the stranding of the 'Aakre' was exclusively due to errors of navigation in the respects above described, and that her stranding not only was not caused or contributed to by any unknown deviation in her compass or any failure, of which her navigators may have been guilty, to record all her compass deviations in her compass book, but, under the facts here shown, could not have been caused thereby."

Majority opinion of Circuit Court of Appeals, pp. 1447, 1448:

"The court found, however, that adequate observations had been made, and, from the logbook entries, that the deviation in the southwest quadrant had never been greater than three degrees. Of this maximum deviation the navigator was apprised by an entry in the compass book September 30, 1937, showing a plus three-degree deviation on a course S 50° W; and if the navigator failed to make proper allowance for it the night of the accident, his error could not be attributed to lack of information. Since the compass book carried the particular entry necessary for this occasion, even a fairly general deficiency in the records could not have been material to the stranding. Furthermore, it is a sufficient answer to this charge, as to the former, that no possible error in the ship's course before the period of drifting could have affected her navigation afterwards, and that three

degrees' difference in her course after 2:45 A. M. would not have saved her from the effects of the captain's misconception of his position."

Page 1449:

"On the contrary, it has already been stated that the compass was shown to be highly accurate, and the compass book was shown to conform to ordinary requirements, at least in respect of the southwest quadrant. In other quadrants it was not radically deficient."

(3) that, however strictly the rule of the *Pennsylvania* may be applied, the respondent in fact sustained the burden of proof imposed thereby.

District Court, pp. 1401, 1402:

"I think it unnecessary for me to discuss or decide the juridical status before this Court in this cause of the Norwegian Statutes relied on by cargo. Because, even if they have the effect on the burden of proof for which cargo contends, and make the so-called Pennsylvania rule applicable, this is one of the rare cases in which the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding."

Majority opinion of Circuit Court of Appeals, pp. 1450-1451:

"Still, if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony."

It is a familiar rule that this Court will not review the concurrent findings of two lower Courts and, since the decisions below were based upon the facts and not upon any interpretation of the rule of the *Pennsylvania*, the petition should be denied on that ground.

II

The master had complete faith in his compasses, but considered it unsafe to try to fix his position, after drifting for three hours, by estimating the tides. Hence he used the highly accurate method of radio bearings.

1. The petitioners' argument and Judge Frank's doubts (R. pp. 1455, 1456) are based fundamentally on the erroneous conjecture that perhaps the master may have had little or no faith in his compasses, and Judge Frank suggests that the case be remanded for a further finding on this subject. The majority opinion in the Circuit Court of Appeals (pp. 1448, 1451) found squarely that the compasses were reliable and that the master believed them to be so. The District Court (pp. 1382-1384) found that the compasses were in good condition with proper directive force, well adjusted and reliable and (p. 1384) that the master "said that the compasses were very good". The uncontradicted evidence supports these findings. Captain Oyan had navigated the ship without difficulty on many voyages in the North and South Atlantic and the Mediterranean since leaving Sandefjord in March, 1936. A list of these voyages is in evidence as Exhibit D (pp. 1259-1261). He testified (pp. 210, 211) that he regularly checked the compasses against river ranges, etc., and that local pilots always found them correct, and continued:

> "Q. As a matter of fact, have you had any kind of trouble with your compass at all? A. No, no trouble at all.
>
> Q. Have you or have you not found it reliable to navigate with? A. Very reliable."

Page 230:

> "Q. Captain, did your compass or did any question of deviation or anything of that sort enter into this question of stranding at all or have anything to do with it? A. No, sir."

Page 1014:

> "Q. What is your opinion after having used the compasses as to their reliability? A. I have never seen on those ships I have been on better compasses.
>
> Q. How about the stability and directive force? A. They are very good.
>
> Q. Now, in your opinion as a ship master did you have on the ship when you sailed from St. John on the night of this stranding good compasses? A. Yes, sir.
>
> Q. And did you in your judgment have sufficient compass data for safe navigation? A. Yes, sufficient."

No more definite evidence on this subject could be given and the District Court paid high tribute (pp. 1386-1387) to the truthfulness of the Aakre's master and other witnesses. Hence it would seem that both the reliability of the compasses and the master's belief in it were clearly established, as the majority of the Circuit Court of Appeals found.

Judge Frank (p. 1456) says:

> "There is no doubt that the record contains much evidence that, on prior voyages, the course charted by compass had been strikingly inaccurate; evidence was offered by the ship to explain these facts, but the District Court made no finding, one way or another, with respect to them. Had he done so, I should be strongly inclined to follow his finding; I would now remand for that purpose. * * *"

He draws the conclusion, in the absence of such a finding, that perhaps the master did not trust his compasses. The reference is to evidence put in by the petitioners with

respect to several previous voyages. The petitioners selected certain days on which the ship's observed position was different from her dead reckoning position (ignoring the days when the contrary was true) and argued that these discrepancies were due to the compasses. Each one of these instances was fully investigated and shown to be due to winds, currents, etc. Judge Frank says that the District Court made no finding on this subject; he evidently overlooked the findings at page 1384 (fols. 1451, 1452), concurred in by the majority opinion of the Circuit Court of Appeals at page 1449, to the effect that these matters did not throw doubt on the compasses. On the contrary, the majority of the Circuit Court of Appeals (quoted p. 7, *supra*) found that the compasses were "accurate and reliable" and that the petitioners had "not even made out a serious case to the contrary". There is nothing here which discredits the master's testimony and the findings below that the compasses were in good condition and wholly reliable and that the master had full confidence in them.

2. Fog came on while the ship was drifting and, at the end of three hours, when she was ready to proceed, nothing whatever could be seen. The master obtained radio bearings to fix the vessel's position—a very accurate method. The petitioners seem to suggest that the master ought to have fixed the position by dead reckoning, based on the charts and current tables which he had on board; and Judge Frank suggests (p. 1458) that the case should be remanded for a finding as to whether the master considered the currents "unpredictable". The Aakre's master and officers testified fully on this subject (Oyan, pp. 289, 293, 296, 300, 1017; Knudsen, p. 400; Norberg, p. 453; Magnussen, p. 489). Their view that the currents are strong and uncertain, varying between one place and another, is supported by the official publications both of the United States and of Canada. The Nova Scotia Coast

Pilot, Ed. 1930, published by the United States Hydrographic Office, at page 53, contains the following:

> "The Bay of Fundy is deep, but the navigation is *not only difficult but dangerous* by numerous off-lying dangers guarding the approaches, *by rapid and uncertain tides, as well as by the frequent occurrence of dense fogs.*" (Italics ours.)

The supplement carrying it to 1937 contains no modification.

The Canadian Government's Tables of Currents in the Bay of Fundy, Exhibit EE, at page 7, contains the following:

> "*Special Note.*—The characteristic of the current which deserves special attention, is *the change found at points only a few miles apart.* The behaviour of the current is very regular and constant at any definitely fixed point; but *a change in position of even a few miles may make a marked difference in its character. This difference is chiefly in the strength* and in the time of slack water, and not so much in the direction. In passing islands, the strength may be very different indeed, according to the offing given; and in channels and passages there may be a difference, between the centre and the sides, of an hour in the time of slack water." (Italics ours.)

That was Captain Oyan's view. He said (p. 289) that

> "the Bay of Fundy, as we all know, has very strong tides going. Without seeing anything nobody can say sure where the ship stands."

At page 293:

> "You know it is a very dangerous water and big currents that cannot be reckoned which way, and we take bearings to get the ship's position."

At page 300:

> "Nobody can tell anything accurate with the tides like that * * *."

Magnussen (p. 489):

> "When a current is setting so uncertain as in the Bay of Fundy it is impossible to state where the ship is drifting."

To safeguard navigation in these waters, unusually numerous lights are provided, so that a vessel can go out from one light to another (Morrisey, pp. 505, 511, 512; Oyan, p. 324). Lights are of no use when they cannot be seen because of fog; therefore radio stations on shore are provided to give bearings to ships in fog, and, by getting cross-bearings from two or more stations, the precise position of a vessel can be ascertained. Captain Oyan proposed, quite rightly, to use these aids to navigation. To say that his unwillingness to go out through the Bay of Fundy in dense fog by dead reckoning only, means that he did not trust his compass is so far-fetched that it needs no answer. He said (pp. 1016, 1017):

> "Q. You mean you would not go to sea by dead reckoning? A. No.
>
> Q. Is that because your compasses were so bad or wouldn't you do it on any ship? A. No, I wouldn't do it on any ship because the currents in my opinion are so uncertain.
>
> Q. So as I understand you, you started off on this course intending to alter it as the lights indicated, or if there were fog, as radio bearings indicated? A. Yes."

There is no contradictory evidence and no possibility of any finding except that these witnesses (specifically found to be truthful) did believe that the tidal conditions were what they testified.

The ship concededly had on board such printed information as there is about the currents and perhaps, as the majority opinion below suggests (p. 1449), the master made an error of navigation in not trying to check his drift from this information; but, quite obviously, the sight of a light or a radio bearing would be far more reliable than

any deduction from current tables. It seems absurd to suggest that, when an accurate location of a ship's position is possible by radio bearings, any master would be justified in an attempt to "dead reckon" the tides of the Bay of Fundy.

Manifestly, nothing in the foregoing throws doubt on the master's confidence in his compasses. Compasses have nothing to do with drift.

III

The opinions of the Courts below fully recognize the rule of the *Pennsylvania* and involve nothing contrary to the decisions of this Court or of other Circuit Courts of Appeals.

The petition (pp. 11-12) quotes decisions under the *Pennsylvania* made by the Circuit Courts of Appeals for most of the other circuits, but conspicuously omits the Second Circuit, although more decisions under the *Pennsylvania* have been rendered in that circuit than in any of the others. Far from ignoring the *Pennsylvania*, the Circuit Court of Appeals for the Second Circuit has applied it during the last ten years in the following cases:

Marshall Field & Co. v. *U. S.*, 48 Fed. (2d) 763;
The Fulton, 54 Fed. (2d) 467, 469;
The Azua, 56 Fed. (2d) 434, affirming 56 Fed. (2d) 432;
The Clevelander, 83 Fed. (2d) 947 (vessel held not to have violated statute);
Southern Pacific Co. v. *U. S.*, 72 Fed. (2d) 212, 215 (burden of proof held sustained);
The New York Marine No. 10, 109 Fed. (2d) 564, 566;
Henry du Bois v. *A/S Ivarans Rederi*, 116 Fed. (2d) 492, 493; cert. den. 85 L. Ed. 844.

In the *New York Marine* case in particular, the Court applied the *Pennsylvania* rule very strictly. Other decisions of the same Court which have applied the rule, though without specifically citing the *Pennsylvania*, are:

> *Ocean S.S. Co.* v. *U. S.*, 38 Fed. (2d) 782, 785;
> *The San Simeon*, 63 Fed. (2d) 798, 801, cert. den. 290 U. S. 643;
> *The Luna*, 63 Fed. (2d) 808, 809;
> *The Richard J. Barnes*, 111 Fed. (2d) 294.

The petitioners complain (p. 6 of the petition), that the Court below said that the effect of the *Pennsylvania* rule was to shift the burden of proof in regard to causality; but that is precisely what was said by the Circuit Court of Appeals for the Ninth Circuit in the *Denali*, 105 Fed. (2d) 413, at 418, in a passage which the petitioners quote on the same page 6 of their petition. The latter Court, as quoted by petitioners, said that "the violator is burdened with the penalty of showing that the violation not only probably did not cause the accident, but that it could not have done so." In the present case, the majority opinion below said (p. 1450) that the violator must "prove that the violation *could not* have contributed." The two statements, far from being "squarely in conflict", as the petition (p. 8) asserts, are practically identical. The majority opinion here says that the rule deals with the burden of proof. The *Denali* says the same. The majority opinion here goes on to say that the rule does, or may, go so far as to require

> "the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference" (p. 1451).

No stronger statement of the rule could be imagined. The majority opinion treats the rule as a rule of evidence. The petitioners themselves say (p. 31):

> "The rule of the *Pennsylvania* is a rule of evidence which does not affect the substantive rights of the parties."

Both the petitioners and the *Denali* case appear, therefore, to take the same view as the Court below.

At page 8, the petition asserts that the majority opinion below, in effect, holds that it is sufficient for the violator to prove that the violation "probably was not a contributing cause". The majority opinion says nothing of the kind; and does say the contrary.

There is nothing whatever in the majority opinion to indicate that the Court below construed the rule of the *Pennsylvania* in any respect differently from any other court.

The petitioners complain of the statement in the majority opinion (p. 1448) that, if the compass book did not contain all the entries which good seamanship required, nothing was added to the argument by proof of the Norwegian statute; but the petitioner fails to point out that the Court was speaking only of the materiality of the supposed violation and quite correctly said that, if the materiality of the violation were disproved, the result was the same, whether or not a statute were involved.

The petition suggests that if the Aakre's compass records had had more entries, perhaps the accident would have been avoided. It ignores the obvious fact that no amount of compasses or of compass records could have given the slightest indication as to where the vessel was drifting during that period of three hours. Running throughout the petitioners' argument is the false assumption that a compass tells the position of a ship. Of course it does nothing of the kind. The majority in the Court below did not, as repeatedly stated by the petitioners, substitute its judgment for that of the statute. It found that the requirements of the statute had nothing to do with the accident.

Discussing the matter from a somewhat broader point of view, the petitioners' position seems to be that the rule of the *Pennsylvania* requires the violator of a statute affirmatively to disprove any possible connection between the violation and the accident which can be imagined by any flight of fancy. In other words, the petitioners argue that the presumption is practically conclusive, for it is

possible to imagine some conceivable indirect relation of cause and effect between almost any one event and almost any other. In the present case, the petitioners wish to conjecture, in the teeth of the evidence and of the findings, that the master did not trust his compasses. Their next step is to say that, if the master had trusted his compasses, then perhaps he would have been so surprised at the drift of his vessel that he would have taken further steps to verify it, although, as already remarked, no compass affords any information whatever with respect to the drift of a vessel. The argument is nothing but a series of conjectures, opposed to the evidence and to the findings below, involving the sort of "metaphysical niceties" into which this Court declined to enter in *Atchison Ry.* v. *Calhoun*, 213 U. S. 1. To leave matters "in the realm of speculation and conjecture * * * is not enough" (*Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478). If every remotely conceivable theory of causation must be negatived, it would be better to say at once that the rule of the *Pennsylvania* is one of *conclusive* presumption.

The principles of law, including the rule of the *Pennsylvania*, must be applied in a practical and realistic manner. There are limits to the amount of conjecture which the law will permit. In the present case, the very first premise of the petitioners' argument is negatived by the facts already found, and the whole of it is too illusory and too fanciful to be accepted in the practical administration of law.

IV

Since such presumptions do not now exist in the law of Canada, the rule of the *Pennsylvania* probably does not apply to this case at all.

It seems at least seriously doubtful whether the doctrine of the *Pennsylvania* is applicable here. If it is a mere rule of evidence, of course it does apply as part of the *lex fori*. If, on the other hand, it is a rule affecting substantive rights, then whether it applies here would depend on

whether it is part of the law of Canada, which concededly governs this case.

Cities Service Co. v. *Dunlap*, 308 U. S. 208;
Central Vermont Rway. Co. v. *White*, 238 U. S. 507.

In *Richelieu Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408, a vessel stranded because she was running too fast in fog. There was a Canadian statute, quoted at page 422 of the report, which this Court construed to create a presumption similar to that of the *Pennsylvania*. This Court pointed out, in the *Richelieu* case, that the vessel involved was Canadian, was navigating Canadian waters between Canadian ports, and was governed by the law of Canada. Accordingly the Court applied the Canadian statute just referred to. That seems to be a decision that, in cases governed by the law of Canada, that law should be looked to to determine whether or not such a presumption exists. The present is the case of a Norwegian vessel sailing from a Canadian port for a South American port and stranding in Canadian waters, and all parties agree that the law of Canada, particularly the Canadian Water Carriage of Goods Act, 1936, governs the case. It would seem that, following the *Richelieu* principle, the law of Canada should determine the question of presumption.

Under the law of Canada, there are now, and at the time of this accident were, no such presumptions. All that remains of the statute referred to in the *Richelieu* case is contained in Section 639 of the Canada Shipping Act of 1934, which provides merely that the non-observance of *collision* regulations shall be deemed to be the wilful default of the person in charge of the vessel, unless it is shown that circumstances made a departure from the regulations necessary. The former provisions as to liability of the shipowner no longer exist and the statute has no application to the present case. The Maritime Convention of 1910 (text in Marsden, Collisions, 9th Ed., pp. 542-545) and legislation thereunder (the Canadian Maritime Conventions Act of May 27, 1914, 4-5 Geo. V, Chap. 13, Sec. 5)

abolished such presumptions in collision cases, and there are none under the general law of Canada.*

In *Can. Pac. Ry.* v. *The Storstad,* 17 Exch. Rep., Canada, 160, 170, 171, the Court said:

> "As is well known, there is a difference between the English law and our law that used to exist and which has been very recently abolished. All the English jurisprudence is under the old law. In England, *formerly,* a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law the *plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.*" (Italics ours.)

In *Fraser* v. *The Aztec,* 19 Exch. Rep., Canada, 454, 467, the Court said:

> "The burden was upon plaintiff to prove that the non-observance of the rule contributed to the accident, as non-observance of the rule by itself created no presumption, and the common law applied, and the plaintiff had to prove the cause of the collision" (affirmed 20 Exch. Rep. 450).

In *George Hall Coal Co.* v. *The Parks Foster,* Canada Law Reports, 1923, 56 at 63, the Court said:

> "The burden was upon defendant to prove that the non-observance of the rule contributed to the accident, as its non-observance by itself created no presumption: *Fraser* v. *S/S Aztec* (1920), 19 Ex. C. R. 454, at pp. 467-468."

The general law is illustrated by *Grand Trunk Railway Co.* v. *McAlpine,* 1913 A. C. 838, an appeal from Canada, involving the right to recover damages sustained at a railroad crossing, where the railroad had been guilty of the breach of a statutory duty. The Court held (as stated in the headnote):

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* By stipulation, Exhibit 1, at page 1192, it was agreed that the parties might refer to Canadian and British statutes and decisions as proof of the law of those countries.

> "That in an action for damages for personal injuries a plaintiff relying on the breach of a statutory duty must prove not only the breach, but also that the breach caused the injuries."

In England, such presumptions were abolished by the Maritime Conventions Act of 1911 (1 and 2 George V, Chap. 57). The English rule is thus stated in Marsden (9th Ed., p. 65):

> "The effect of the Act" (Maritime Conventions Act) "is to abolish an arbitrary rule by which any infringement, which by possibility might have contributed to the collision, rendered a vessel to blame and to 'leave the Court to follow what is a reasoning judgment and to say, "Did this want of obeying the regulations in any way contribute to the collision?" not "Might it possibly have done so?"' It has thus now again become necessary to prove that non-observance of a regulation was the cause or part of the cause of a collision or of the damage resulting from the collision, *as it always had been before 1873.*" (Italics ours.)

In England, there are no such presumptions, either in admiralty or at common law (*The Heranger,* 1939 App. Cas. 94, at 104).

The laws of Canada and that of England are therefore the opposite of that for which cargo contends. In the absence of statute, those laws create no presumption. Whatever statutory presumptions formerly existed have been abolished.

No one suggests that there is any such presumption under the law of Norway, and none was proved, although a Norwegian lawyer was called by the petitioners as a witness.

The general rule at common law is that violation of a statute does not create such a presumption.

> *St. Louis etc. Co.* v. *McWhirter,* 229 U. S. 265;
> *Taylor* v. *City of Yonkers,* 105 N. Y. 202;
> 45 *Corpus Juris,* 902, 905;
> Shearman & Redfield, *Negligence,* 6th Ed., Sec. 27.

It would be inconsistent with the *Richelieu* case to apply the law of the United States as the *lex fori* here. If our courts, in deciding cases governed by Canadian law, apply that law when it creates a presumption, they must apply it likewise when it does not create one.

Moreover, the petitioners' contention would lead to the strange result that our courts, in deciding such a case under Canadian law, would reach one conclusion if the vessel belonged to a country having such regulations as those of Norway, and a different conclusion if the vessel belonged to another country having no such regulations.

Finally, the Canadian Water Carriage of Goods Act, which governs this case (Schedule of Rules, Art. IV, subds. 1 and 2) places upon the petitioner the burden of proving (1) that the ship was unseaworthy; (2) that the unseaworthiness caused the accident (*Carver, Carr. by Sea,* 8 Ed., Sec. 17). The petitioners are seeking to substitute for this proof, required by the Canadian statute, a presumption which does not prevail under the law of Canada.

V

Conclusion

It is submitted that the decisions below are decisions on the facts raising no question for the review of this Court; and that, in so far as the rule of the *Pennsylvania* was discussed in the courts below, its validity was fully recognized and no decision was rendered which in any way conflicts with the decisions of this Court or of other Circuit Courts of Appeals.

Dated, New York, N. Y., November 19, 1941.

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